**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**

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| THOMAS SOURAN, KELLY REARDON, ROY WILKIE, CARMEN GONZALEZ, LOUIS RAMZY, ADAM SMITH, and MICAH LEWIS, individually and on behalf of all other similarly situated individuals,<br><br>Plaintiffs,<br><br>v.<br><br>GRUBHUB HOLDINGS INC. and GRUBHUB INC.<br><br>Defendants | Civil Action No. 1:16-cv-06720 |

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR A RULING THAT THEIR CLAIMS CANNOT BE COMPELLED TO ARBITRATION**

Two weeks ago, the Supreme Court affirmed the First Circuit's ruling in New Prime v. Oliveira, U.S. Supreme Ct. No. 17-340, 2019 WL 189342, *5, *7 (Jan. 15, 2019), holding that: (1) courts (not arbitrators) must decide the applicability of the transportation worker exemption to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, and (2) whether workers are employees or independent contractors does not matter for purposes of deciding the applicability of this exemption. The Supreme Court held that the transportation worker exemption applies to all transportation workers engaged in interstate commerce, regardless of whether they are employees or independent contractors because "[w]hen Congress enacted the Arbitration Act in 1925, the term 'contracts of employment' referred to agreements to perform work" rather than contracts between an employer and an employee. Id. at *10. Thus, in the wake of New Prime, this Court need not make an initial inquiry into whether GrubHub delivery drivers are independent contractors or employees; instead, the question facing the Court now is whether GrubHub delivery drivers qualify as "transportation workers engaged in interstate commerce" as those terms have been defined for purposes of 9 U.S.C. § 1.

In its Opposition, GrubHub makes a litany of arguments regarding why Plaintiffs do not qualify as transportation workers engaged in interstate commerce within the meaning of Section 1. As set forth below, GrubHub is mistaken; the Court should hold that Plaintiffs fall under this exemption and reaffirm its denial of GrubHub's motion to compel arbitration (but on this separate ground).

In addition, as now made clear by the Supreme Court's decision in Oliveira, if Plaintiffs are mistaken in this argument – and GrubHub is not actually involved in interstate commerce, then the FAA does not even apply here, under § 2 of the FAA (9

U.S.C. § 2).

As noted in Plaintiffs' motion, if the FAA does not apply to this case, GrubHub's motion to compel arbitration must be denied, as its arbitration agreement does not provide for arbitration under any state law. Even if state law were to apply, states (including Illinois, and others from where drivers have opted in) have regularly declined to enforce arbitration agreements that do not allow for class actions. Thus, in the absence of federal preemption, the agreement is unenforceable under state law.

## ARGUMENT

### I. Contrary to GrubHub's Contentions, Plaintiffs are Engaged In Transportation of Goods in the Flow of Interstate Commerce for a Transportation Company

In its Opposition, GrubHub insists that Plaintiffs cannot qualify as transportation workers engaged in interstate commerce because: (1) Plaintiffs did not physically cross state lines as part of their deliveries; and (2) even if Plaintiffs' intrastate deliveries could qualify them as transportation workers, the nature of Plaintiffs' work is too "local" to qualify. GrubHub's arguments are erroneous for several reasons.[1]

First, GrubHub's contention that the Section 1 exemption does not apply to delivery drivers making intrastate deliveries is simply not correct and is contradicted by the numerous decisions finding other workers to fall within the exemption. See, e.g., Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988) (postal worker who did not cross state lines engaged in interstate commerce because postal workers are

[1] Further, as discussed infra at Section III, if the Court were to agree with GrubHub Plaintiff's work is too "local" to qualify for the Section 1 exemption of the FAA, then GrubHub's work is also too "local" to bring its contracts with GrubHub drivers under Section 2 of the FAA and thus the FAA **would not apply at all.** In that event, the Court would have to deny GrubHub's motion to compel arbitration under the FAA because the FAA would not even be applicable.

"responsible for dozens, if not hundreds of items of mail moving in interstate commerce on a daily basis."); American Postal Workers Union, AFL-CIO, 823 F.2d at 473 (11th Cir. 1987) (also holding postal workers engaged in interstate commerce); Ward v. Express Messenger Sys. Inc. dba Ontrac, Civ. A. No. 1:17-cv-02005 (Jan. 28, 2019), Dkt. 118 at *8 (attached as **Exhibit A**) (holding that last-mile delivery drivers who only performed intrastate deliveries within Colorado were "transportation workers engaged in interstate commerce" – and thus denying defendant's motion to compel arbitration, in light of Supreme Court's New Prime decision); Christie v. Loomis Armored US, Inc., No. 10-cv-02011-WJM-KMT, 2011 WL 6152979, at *3 (D. Colo. Dec. 9, 2011) (an armored vehicle driver was a member of "a class of workers engaged in interstate commerce and is therefore exempt from the FAA pursuant to Section 1," even though the plaintiff herself did not cross state lines to make the deliveries); Palcko v. Airborne Express, Inc., 372 F.3d 588, 594 (3d Cir. 2004) (refusing to "unnecessarily narrow" section 1's interstate commerce requirement to exclude those who did not actually physically transport goods across state lines). As the Third Circuit has noted, "if Congress intended the residual clause of the exemption to cover only those workers who physically transported goods across state lines, it would have phrased the FAA's language accordingly." Id. at 593–94.

In any case, GrubHub contends that even if performing deliveries across state lines is not necessary to qualify for Section 1's exemption, Plaintiffs are nonetheless disqualified because they are "nothing like the railroad workers, seamen, or nationwide interstate truck drivers contemplated by Congress" as their work involved "local deliveries to local customers of food prepared by local restaurants." Dkt. 142 at 5, 9. In

GrubHub's view, the many favorable cases cited by Plaintiffs are distinguishable because they involved companies that engage in "interstate commerce" even if their employees did not physically transport goods across state lines.[2] But GrubHub's contention that Plaintiffs do not qualify for the Section 1 transportation workers exemption is based on the false premise that GrubHub is not a " 'transportation company' [] engaged in interstate commerce", see Dkt. 142 at 9; GrubHub is clearly a delivery company which does business nationally[3] and touts its ability to provide delivery services for numerous national chain restaurants, whose supply chains involve the interstate delivery of pre-packaged sodas, chips, and other foods to their customers which are clearly in the flow of interstate commerce. Plaintiffs provide last-mile delivery for these restaurants of various foods -- both pre-packaged and prepared -- to customers' homes and businesses. In this sense, they are just like the last-mile delivery drivers in the recent Ward decision, making intrastate deliveries of goods that are in the flow of interstate commerce for a transportation company engaged in interstate commerce.

In Ward (attached as **Exhibit A**), a federal court in Colorado recently held that last-mile delivery drivers qualified for the Section 1 transportation worker exemption. The Ward court found that in light of the Supreme Court's decision in New Prime, the drivers' status as independent contractors was immaterial to Section 1's exemption, and

[2] For instance, GrubHub argues that the currency delivery driver in Christie was delivering goods for a company that was involved in interstate commerce (because currency necessarily is transported across state lines) and the postal worker in Bacashihua likewise worked for an organization (the postal service) that was involved in interstate transportation of mail. By the same token, the supervisor in Palcko supervised drivers responsible for interstate delivery of goods. Dkt. 142 at 8-9.

[3] Indeed, this case now includes opt-in plaintiffs from 43 of the 50 states, showing GrubHub's national reach and its significant impact on interstate commerce. See Dkt. 8, 10, 11, 12, 15, 33, 41, 43, 44, 64, 73, 90, 95 through 100, 104 through 112, and 114.

it went on to consider whether the drivers were transportation workers engaged in interstate commerce within the meaning of Section 1. The court noted that:

> Defendants contend that the [] Plaintiffs, … are not transportation workers because they did not move goods in interstate commerce; they instead made only intrastate deliveries in Colorado. … Plaintiffs counter that they are all transportation workers because they are all drivers in the transportation industry, and though they may not have transported goods across state lines, they directly engaged in the movement of goods in interstate commerce…

See Ex. A at *9. The court ultimately agreed with Plaintiffs' view. Moreover, in Ward, the defendant company identified as "provid[ing] *regional* same-day and overnight package delivery services," and operated in eight specific states (Arizona, California, Nevada, Washington, Utah, Colorado, and Idaho). See Ex. A at *1. Here, GrubHub operates across the country, as evidenced by drivers opting in to the case from 43 different states. GrubHub also provides national *and* local restaurants and diners the resources of a national delivery company. GrubHub's attempt to characterize itself as a local business because its delivery drivers connect local restaurants to local diners misses the point.

In its opposition, GrubHub also misconstrues the impact of case law Plaintiffs have cited regarding the processing of raw milk. GrubHub delivery drivers are involved in interstate commerce because the food they deliver is squarely in the flow of interstate commerce. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). GrubHub delivery drivers continue that flow of interstate commerce by accomplishing last mile delivery to customers. Drivers not only deliver Pad-Thai to diners, Dkt 142 at 9, but also pre-packaged goods that have not been altered in any way -- including soda, chips, and bottled water. The fact that they deliver some food items that are not altered *at all* qualifies GrubHub delivery drivers as involved in interstate commerce for the

purposes of the transportation worker exemption.

However, with respect to the cooked food items, Plaintiffs cited cases regarding the processing of raw milk products to illustrate that courts have recognized that not all food processing interrupts the flow of interstate commerce of food items. These cases illustrate that some food processing (for those items that GrubHub drivers deliver that are not packaged goods like chips, sodas, etc.) does not end their interstate journey. These cases held, for example, that the alteration of pasteurized milk into specialized beverages (such as chocolate milk) or snacks (such as cottage cheese) did not break the interrupt of interstate travel of these ingredients. See Glowacki v. Borden, Inc., 420 F.Supp. 348, 351, 353 (N.D. Ill 1976); Scardino Milk Distribs., Inc. v. Wanzer & Sons, Inc., 71 C. 693, 1972 WL 498, at *5 (N.D. Ill. Aug. 11, 1972). These cases analyzed whether such use of pasteurized milk constitutes an alteration sufficient to break the flow of interstate commerce under the Robinson-Patman Act. Their analysis is relevant to the Court's analysis of Section 1 of the FAA language "involving foreign or interstate commerce" language, as both Acts confer "more limited 'in-commerce' jurisdiction," which follows a stream-of-commerce standard. See Glowacki, 420 F.Supp. at 351-52 (contrasting with the broader "affecting-commerce" jurisdiction Congress may confer under the Commerce Clause).[4]

GrubHub also points to recent decisions ruling that "gig economy" food delivery

[4] The one example from the case law Plaintiffs have cited that GrubHub engages with, that conversion from fluid milk into ice cream breaks the flow of interstate commerce, was used to illustrate the outer boundary of the stream of commerce, as an example of when the stream of commerce is broken because the ingredient no longer retains its essential identity due to alteration. Glowacki, 420 F.Supp. at 351-53. Applying that decision to GrubHub's example of Pad Thai, the raw ingredients at issue, such as noodles, clearly retain their identity, analogous to the conversion of milk to chocolate milk and do not undergo an essential transformation that alters the ingredient into a wholly different substance.

drivers do not fall under the Section 1 transportation workers exemption because they are not delivering food in the flow of interstate commerce. As Plaintiffs explained in this motion, they believe these cases were incorrectly decided; notably, they have not received the benefit of appellate review. Dkt. 127 at 14-15 n. 14 (addressing Levin v. Caviar, Inc., 146 F. Supp. 3d 1146, 1154 (N.D. Cal. 2015), Magana v. DoorDash Inc., 343 F.Supp.3d 891 (N.D. Cal. 2018) and Lee v. Postmates, Inc., 2018 WL 4961802 (N.D. Cal. Oct. 15, 2018)).[5]

The Ward decision correctly held that workers performing last mile deliveries were engaged in interstate commerce, and it illustrates the correct application of the Section 1 transportation worker exemption to last-mile delivery drivers. Ward provides the most instructive example for this Court to follow regarding interpreting the flow of interstate commerce and the workers' engagement in interstate commerce for the purposes of section 1 because: (1) Ward was decided *after* the New Prime decision clarifying the exemption; (2) Ward applied on point case law interpreting the flow of commerce standard under the FAA; and (3) Ward engaged in detailed analysis, rather than summarily deciding or refusing to consider the plaintiffs' arguments regarding the exemption (as did the courts in Levin, Magana, and Lee).

First, the Ward court recognized that New Prime "further refined the applicability of § 1 to transportation workers," and that therefore the court was obligated to engage in a detailed analysis answering the question of whether the section 1 transportation worker exemption prohibited application of the FAA. Ex. A at *7. Second, the court correctly applied Palcko, Christie, and Lenz – three decisions squarely addressing

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[5] While Levin was settled while on appeal, the Lee case is now pending at the Ninth Circuit. See Lee v. Postmates Inc., Ninth Cir. Appeal No. 19-15024.

whether workers were engaged in interstate commerce for the purposes of the section 1 exemption, as cited supra at p. 3, to the facts in Ward. Ex. A at *7, 9-11. Finally, the court in Ward engaged in a detail analysis utilizing the Lenz factors and analogizing to Palcko and Christie, Ex. A at *11 ("Plaintiffs work in the transportation industry, are directly responsible for transporting goods in interstate commerce, handle goods that travel in interstate commerce, use vehicles that are vital to the commercial enterprises of Defendants, are employees that would disrupt the flow of interstate commerce if they went on strike, and cannot perform their job duties without the use of their own or Defendants' vehicles. This is sufficient to deem Plaintiffs transportation workers."). The court in Ward correctly recognized that, although Plaintiffs did not actually cross state lines, further analysis was required under section 1.

In contrast, the court in Levin wrongly relied on dicta in easily distinguishable cases, as well as on caselaw interpreting the flow of commerce standard under the Fair Labor Standards Acts ("FLSA"), which differs from the flow of commerce standard that applies in cases under the FAA. Dkt. 127 at 14-15 n. 14. The court in Magana, in turn, summarily relied on the incorrect ruling in Levin that because DoorDash drivers do not actually cross state lines, the drivers *per se* could not be considered to be working in interstate commerce; the Magana court therefore declined to engage in any further analysis on the question. See Magana, 343 F.Supp.3d at 899 ("[Plaintiff] does not allege that he ever crossed state lines as part of his work. As such, there is no allegation that he engaged in interstate commerce"). The court in Lee also refused to engage in any substantive analysis regarding application of the Section 1 exemption to Postmates drivers and instead simply cited to the language in Levin that misapplied the FLSA's

definition of flow of interstate commerce to the analysis to foreclose the question. See Lee v. Postmates, Inc., 2018 WL 4961802, at *6-8. The court in Lee further noted that the plaintiffs had not fully briefed an analysis of the factors set forth in Lenz v. Yellow Transportation, Inc., 431 F.3d 348 (8th Cir. 2005), and therefore declined to examine these factors. Here, in contrast, Plaintiffs have set forth a comprehensive analysis of the Lenz factors.

## II. Applying the Lenz Factors, It is Clear That Plaintiffs Are Transportation Workers Engaged in Interstate Commerce

In its opposition, GrubHub also erroneously argues that the Court should not consider the Lenz factors, notwithstanding the fact that numerous courts outside the Eight Circuit have considered these factors as part of their analysis of what qualifies a worker for the transportation worker exemption under Section 1 of the FAA. For instance, in the recent Ward decision, the court considered the various Lenz factors and noted that "Plaintiffs work in the transportation industry, are directly responsible for transporting goods in interstate commerce, handle goods that travel in interstate commerce, use vehicles that are vital to the commercial enterprises of Defendants, are employees that would disrupt the flow of interstate commerce if they went on strike, and cannot perform their job duties without the use of their own or Defendants' vehicles…**even in the absence of any indication that Plaintiffs transported goods across state lines**." Id. at 11-12 (emphasis added).

The same is true here with respect to GrubHub delivery drivers: GrubHub delivery drivers work in the transportation industry as delivery drivers are directly responsible for transporting goods in the flow of interstate commerce and handling packaged goods such as chips, sodas, and other products, which have traveled

interstate and have not been "altered" in any way by the restaurant, such that it is clear that these goods are in the flow of interstate commerce. Plaintiffs plainly meet the first two criteria as they deliver packages that are in the flow of interstate commerce for a company whose main purpose is to transport food and beverages. See, e.g., Zamora v. Swift Transp. Corp., 2008 WL 2369769, at *6 (W.D. Tex. June 3, 2008) ("In order to be considered a transportation worker, an employee must actually be employed in the transportation industry, that is, an industry directly involved in the movement of goods."); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 118 (2001) (noting that the phrase "engaged in interstate commerce" "means engaged in the flow of interstate commerce" and "denotes only person[s] or activities within the flow of interstate commerce") (quotation marks and citations omitted).

GrubHub's cursory argument that Plaintiffs fail on the second, third, and seventh factor misstates the factual background in the case and misconstrues the law. Contrary to GrubHub's characterization, Plaintiffs regularly deliver unaltered foods that are clearly in the flow of interstate commerce. Grubhub drivers deliver prepackaged and unaltered items from large national chain restaurants, which cannot be divorced from interstate commerce. Moreover, much of the cooked meals Grubhub drivers deliver remain in the stream of interstate commerce as the ingredients flowing from interstate commerce are minimally altered and retain their essential identity, see discussion supra in Part I, making the "last mile" meal delivery the end of the flow of interstate commerce -- not the ingredients' arrival at the restaurant.

With respect to the fourth factor, Plaintiffs reiterate that the factor does not require an employee to have supervisorial responsibilities to qualify for the exemption.

Indeed, given the history of the exemption, such a requirement would be absurd, as it would exclude workers directly engaged in interstate driving, such as bus and train operators who actually cross state lines. Again, the best reading of this factor is that it provides even *broader scope* of the exemption, extending it not just to those individuals actually transporting the goods, but also including employees who supervise such in employees. It would be absurd to claim that Plaintiffs are any less entitled to the exemption because they are the ones transporting the goods, not (more indirectly) supervising such drivers.

GrubHub again misunderstands Plaintiffs as conceding the fifth Lenz factor. The fifth factor considers whether Congress had already prescribed alternative dispute resolutions regimes for the workers. The factor simply cannot speak to GrubHub drivers, and is thus inapplicable here, as the "gig economy" did not exist in the early 20th Century at the time of the FAA's enactment.

On the sixth Lenz factor, GrubHub fails to engage in any meaningful analysis. GrubHub posits that "neither the FAC nor common sense could lead to the conclusion [that the drivers' vehicles are vital to GrubHub's commercial enterprise]." Dft.'s Opp. at 11. However, common sense cuts the other way. If the drivers had no vehicles, no meals would be delivered. Without meal delivery, GrubHub's delivery enterprise could not exist, and therefore the vehicles are vital to GrubHub's commercial delivery enterprise. Thus, the sixth Lenz factor strongly favor's Plaintiffs' position.

With respect to the seventh factor, if GrubHub drivers were to strike, it seems apparent that this would affect not only GrubHub, but numerous other national chain restaurants who depend on GrubHub delivery drivers for delivery of their meals to

customers. Contrary to GrubHub's assertion that a strike must "cripple" a transportation industry, Dft.'s Opp. at 11, this factor only looks at whether a strike would "disrupt" the flow of interstate commerce, for example, by halting delivery of goods in the flow of commerce. See Lenz, 431 F.3d at 353. If GrubHub drivers were to strike, meal delivery would be disrupted, which would disrupt the flow of goods in interstate commerce in the same way as would a strike by truckers delivering the ingredients to the restaurants.

GrubHub curiously omits reference to the eighth Lenz factor. This factor, which considers the nexus between the employee's job duties and the vehicle the employee uses in carrying out his duty, favors application of the transportation exemption in this case, following the analysis set forth above for factor four. See, supra; Pltf,'s Mtn. at 14.

Finally, GrubHub's argument that application of the Lenz factors runs counter to Circuit City is incorrect. The Lenz court approvingly cited Circuit City at the beginning of its analysis setting forth the applicability of the Section 1 exemption. Lenz, 431 F.3d at 351. The decision builds upon Circuit City and elaborates factors for determining whether employees fit into the narrow exemption explained in Circuit City; application of the Lenz factors is in no way irreconcilable with Circuit City.

## III. If Plaintiffs' Delivery Work Does Not Involve Interstate Commerce (and Thus Plaintiffs Do Not Fall Under the Section 1 Transportation Workers Exemption of the FAA), Then Plaintiffs' Contracts Do Not Fall Under the FAA at All Pursuant to Section 2 of the FAA

As noted at the outset of this brief (see note 1), if the Court disagrees with Plaintiffs' argument that their work involves interstate transportation of goods (and thus agrees with GrubHub's argument that its business is purely *local* delivery of goods), then GrubHub's contracts with its drivers would not even be covered by the FAA, since Section 2 of the FAA limits the FAA's coverage to contracts related to interstate

commerce. While Section 1 of the FAA (as set forth above and in Plaintiffs' motion) exempts from the FAA's coverage transportation workers engaged in interstate commerce, Section 2 makes clear that any contracts must involve interstate commerce even to fall under the coverage of the FAA in the first place.[6] Indeed, in New Prime, the Supreme Court reopened this issue of what constitutes "interstate commerce" for purposes of Section 2 of the FAA. In New Prime, the Supreme Court enunciated that the "interstate commerce" requirement in sections 1 and 2 *must be defined in relation to each together*. 139 S.Ct. at 537 ("§1 helps define § 2's terms").

Thus, if this Court were to follow those cases that GrubHub cites, where courts have ruled that "gig economy" drivers do not fall under the Section 1 transportation worker exemption to the FAA, because their work pertains only to local *intrastate* deliveries – i.e. Levin, 146 F. Supp. 3d 1146; Magana, 343 F.Supp.3d 891; and Lee, 2018 WL 4961802 – then the Court should logically now hold that the FAA is not even at issue here because Section 2 limits the application of the FAA to contracts involving interstate commerce (an argument that was not raised, and thus not previously addressed in those cases).

Thus, while Plaintiffs do not agree with those cases (and as discussed supra at pp. 7-9 believe that those plaintiffs should have been recognized as falling under the

[6] In other words, pursuant to Section 2 of the FAA, the FAA only pertains to contracts related to interstate commerce. Section 1 then exempts those contracts that relate to "transportation workers" involved in interstate commerce. If the contracts do not even involve interstate commerce in the first place, then (pursuant to Section 2), the FAA does not apply at all. See Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 454 (2012) ("[I]n order to activate the application of the FAA, the commerce involved in the contract must be interstate or foreign."). Indeed, it is clear that the FAA ***could not*** apply to contracts unrelated to interstate commerce because such regulation would be outside Congress' power under the Constitution's Commerce Clause. See Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (recognizing that the Commerce Clause limits reach of FAA).

Section 1 transportation workers exemption), if those cases are correct, then the plaintiffs' contracts do not relate to interstate commerce and do not fall under the FAA at all, pursuant to Section 2 of the FAA. In that case (if the Court chooses to follow the logic of those cases and holds that the food delivery is local and does not involve interstate commerce), then the FAA cannot apply here at all, and GrubHub cannot invoke the FAA to compel arbitration in this case.[7]

## IV. If the FAA Does Not Apply Here, Then GrubHub's Agreement Is Unenforcable, Both Because It Fails to Designate Any State Law That Would Govern in the Absence of the FAA and, Alternatively, Because It Would Be Unenforcable Under Illinois Law (as Well as Most if Not All Other States' Laws)

For the reasons discussed above, the FAA does not apply here (either because GrubHub drivers fall under the transportation worker exemption of Section 1, or because their work does not affect interstate commerce, in which case the FAA does not apply at all under Section 2). Because the FAA does not apply, and because GrubHub's agreement does not provide for any state's arbitration law to govern its agreement in the absence of the FAA, GrubHub cannot compel arbitration of the drivers' claims. See Easterday v. USPack Logistics LLC, Civ. Act. No. 1:15-cv-07559, Order at 21-22, Dkt. 42 (D.N.J. June 29, 2016) (suggesting that where an arbitration clause states that the FAA shall govern, but does not provide for what state's arbitration law will govern in the event that the FAA is held not to apply, then the arbitration agreement will

[7] The Eleventh Circuit pointed out this interplay between Sections 1 and 2 of the FAA in American Postal Workers Union, AFL-CIO v. U.S. Postal Service, 823 F.2d 466 (11th Cir. 1987), where it held that postal workers qualified for the Section 1 transportation worker exemption (despite only making intrastate deliveries) because, if the work did not involve interstate commerce, then the contracts would not even be covered by the FAA, pursuant to Section 2. As the court explained, "such an argument [that the work does not involve interstate commerce] would not only take [the employment contract] out of the exclusionary language in section one, it would also remove the agreement from the inclusionary language of section two." Id. at 473 n. 10.

not be unenforceable) (citing Palcko, 372 F.3d at 590-96). GrubHub has countered this argument by insisting that Illinois state law would "likely" apply in the absence of the FAA, citing Atwood v. Rent-A-Ctr. E., Inc., No. 2016 WL 2766656, at *3 (S.D. Ill. May 13, 2016).

However, even if Illinois law were to apply, GrubHub's contract would then not be enforceable. The Illinois Supreme Court ruled in Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250 (Ill. 2006), that arbitration agreements containing class action waivers are effectively unenforceable under Illinois law. As in Kinkel, Plaintiffs' claims can only be cost-effectively vindicated through a class action, rendering the class action waiver unenforceable under state law (should the FAA not apply, and thus no overlay of federal preemption would exist).[8]

**CONCLUSION**

For the reasons set forth here and in their motion, the Court should reject GrubHub's request to compel Plaintiffs' claims to arbitration. The FAA does not apply in this case and, without the FAA, GrubHub cannot compel Plaintiffs' claims to arbitration.

[8] In its opposition, GrubHub appears to assume that, in the absence of applicability of the FAA, Illinois state law would apply to the claims of all Plaintiffs and opt-ins, even those who worked outside of Illinois. However, if the Court were to apply the law of the various states in which these drivers worked, as Plaintiffs noted in their motion, see Dkt.127, at 7 n.7, the arbitration agreement would be unenforceable under many (if not all) of those states' laws. If the Court desires further detailed analysis of those cases, Plaintiffs suggest they be permitted to provide it in additional briefing, as space limitations preclude them from providing it here.

Dated: February 1, 2019

Respectfully submitted,

THOMAS SOURAN et al, on behalf of themselves and all others similarly situated,

By their attorneys,

/s/ Shannon Liss-Riordan

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 1, 2019, 2018, a true and accurate copy of the foregoing reply memorandum was filed via this Court's CM/ECF system.

*/s/ Shannon Liss-Riordan*
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